

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

STUART M. OLIVER
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-55
Case No. D-69-101

S.S.A. No.

Prior to the issuance of the referee's decision in Referee's Case No. S-D-24165 we assumed jurisdiction of the matter under section 1336 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant appealed to a referee from a determination of the Department of Employment which held him ineligible for disability benefits for an indefinite period beginning November 18, 1968 on the ground he received wages or regular wages from his employer during the period of his disability equal to his weekly wage.

The claimant worked as a toll transmission maintenance man for a utility company in Redding, California. The company is engaged in the transmission of interstate and intrastate telephone messages. The claimant's basic rate of pay prior to his period of disability was \$162.50 for a 40-hour week. His hours of work were from 4 p.m. to midnight five days a week. The claimant is a union member and works under a collective bargaining agreement. Section 4.1 of this agreement provides for a shift differential for night and evening work. In the claimant's case, the shift differential was in the amount of \$10. Article 6 of the agreement is entitled "Overtime and Premium Payments" and section 6.5 thereunder provides for a time and one-half wage rate for all work in excess of eight hours per day or 40 hours a week. Further provisions of the collective bargaining

agreement prohibit an employee's regular workweek to include Sunday and require that an employee be given 40 hours other assigned work if he is scheduled to work on Sunday. The effect of this provision is to guarantee that an employee who works Sunday receives overtime or premium pay for that day.

The claimant's initial claim for disability benefits was dated November 20, 1968. He was hospitalized from November 18, 1968 to November 22, 1968. The claimant was released by his doctor to return to work on December 27, 1968. Hospital benefits were paid by the Department of Employment. The claimant was denied weekly basic benefits.

The claimant's last full week of work was from November 10, 1968 through November 16, 1968. His scheduled hours of work for that week were from 4 p.m. to midnight, Monday, Tuesday, Wednesday, Thursday and Saturday. He worked these shifts except for one and one-half hours excused absence on Monday, November 11. He was paid for this excused absence. The claimant also worked eight hours on Sunday, November 10; eight hours on Friday, November 15; and one hour overtime on Thursday, November 13. His pay for that week was \$162.50 regular time, \$10 shift differential, and \$109.97 overtime or premium pay for a total of \$282.47. For bookkeeping purposes the employer showed the claimant's 17 hours of overtime as 17 hours of regular time and eight and one-half hours of premium time. His pay for the overtime was computed by multiplying 25 and one-half hours by his regular rate of pay, including the shift differential.

The employer has a two-part wage continuation plan for sickness or disability. The first week of illness or disability is covered by the collective bargaining agreement. Subsequent weeks are covered by a separate plan. The claimant has sufficient seniority to qualify for full pay, including shift differential, starting the first day of disability for a period of 53 weeks; one week under the provisions of the collective bargaining agreement and 52 weeks under the employer's separate plan. The claimant was paid \$172.50 a week for the entire period of time he was disabled under the provisions of these two plans.

The claimant contends that the employer's plan is meant to supplement disability payments and he is therefore entitled to full disability insurance benefits for the time he was disabled, other than the first week which was covered by the collective bargaining agreement. The claimant further contends that if the employer's plan is found not to be a supplement to disability insurance payments, then he is entitled to disability insurance benefits in an amount sufficient to offset his loss of premium pay.

REASONS FOR DECISION

Section 140.5 of the California Unemployment Insurance Code defines the term "disability benefits" as money payments to an eligible unemployed individual for a wage loss due to unemployment as a result of disability.

Section 2656 of the Unemployment Insurance Code provides:

"2656. An individual eligible to receive disability benefits who receives wages or regular wages from his employer during the period of his disability shall be paid disability benefits for any day in an amount not to exceed his maximum daily amount which together with the wages or regular wages does not exceed for such day one-seventh of his weekly wage, exclusive of wages paid for overtime work, immediately prior to the commencement of his disability."

Section 2601-1 of Title 22 of the California Administrative Code provides in part:

"(1) 'Regular wages' as that term is used in Section 2656 of the code means compensation paid entirely by an employer directly to his employee as a full or partial payment of his remuneration during a period of disability."

* * *

"(n) 'Weekly wage' as that term is used in Section 2656 of the code means any remuneration earned during the last full week of work immediately preceding the claimant's first day of unemployment and disability, except that for good cause the department may determine the 'weekly wage' in any other equitable manner."

Section 1265 of the Unemployment Insurance Code provides:

"1265. Notwithstanding any other provisions of this division, payments to an individual under a plan or system established by an employer which makes provisions for his employees generally, or for a class or group of his employees, for the purpose of supplementing unemployment compensation benefits shall not be construed to be wages or compensation for personal services under this division and benefits payable under this division shall not be denied or reduced because of the receipt of payments under such arrangements or plans."

The Attorney General of the State of California in 34 Ops. Cal. Atty. Gen. 305 and 37 Ops. Cal. Atty. Gen. 83 held that section 1265 is applicable to disability compensation as well as unemployment compensation.

The claimant's first contention is that the employer's wage continuation plan is a supplement to his disability benefits. If we accept the Attorney General's opinion that section 1265 of the Unemployment Insurance Code applies to disability benefits, we must then determine whether the wage continuation plan in this case is a mere supplement to disability benefits or a form of wages.

We are not convinced that the Attorney General is right in his belief that section 1265 is applicable to disability insurance. Section 2602, which is in Part 2

of the Unemployment Insurance Code and specifically deals with disability insurance, reads in pertinent part as follows:

"2602. (a) Except as otherwise provided, the provisions and definitions of Part 1 (commencing with Section 100) of this division apply to this part. In case of any conflict between the provisions of Part 1 and the provisions of this part, the provisions of this part shall prevail with respect to unemployment compensation disability benefits, and the provisions of Part 1 prevail with respect to unemployment compensation benefits."

Section 1265 is contained in Part 1 of the code. Section 2656 is contained in Part 2 of the code. If we give section 1265 the interpretation urged by the claimant, it is clearly in conflict with section 2656 and is therefore made inapplicable under the express provision of section 2602.

However, the decision in this case need not rest upon the reasoning set forth above. Even if we assume that section 1265 applies, the claimant is still ineligible for benefits. The claimant was paid wages rather than supplemental benefits.

The terms and conditions of the plan appear to negate the claimant's contentions that it provides for supplementary benefits rather than wages. The plan refers to pay during disability. Pay is usually considered to be synonymous with wages. Further, the plan under discussion appears to contemplate a status of continued employment with a payment of wages during temporary periods of sickness or disability.

Section 1265 specifically states that benefits shall not be treated as wages. In our opinion the opposite is also true and wages should not be treated as benefits. To hold otherwise would be an inconsistent interpretation of the code sections in question. Although a close look at the terms used in the plan is helpful, the case cannot be resolved by the simple expedient of definitions.

The California Supreme Court had occasion to analyze section 1265 of the code in Powell v. California Department of Employment, 63 C. 2d 103.

In that case the court rejected any test based upon labels as to which payments would constitute supplemental benefits and which payments should be considered wages.

On page 109 the court stated as follows:

" . . . But there would appear to be no reason why collective bargaining agreements which now provide for severance or dismissal pay could not be modified to give such payments a different label and concededly qualify the discharged employee for his full unemployment insurance benefits To resolve the issue according to the label attached, as respondents urge, would accord greater weight to form than to substance"

In view of the court's holding that the name or label attached to the payments is unimportant, we believe it is necessary to carefully analyze the nature of the payments and the purpose for which they are made.

In the Powell case the court specifically held that dismissal and severance pay are supplemental benefits and not wages and thus come within the provisions of section 1265. However, the court cited with apparent approval cases which held that vacation pay and pay in lieu of notice are wages and not subject to section 1265. The principal test appears to be whether the monies are paid with respect to any particular period of time. Dismissal and severance pay, although measured in amount by length of prior service, are not allocated to particular periods of time and generally become due and payable upon the happening of a single event, that being a layoff or discharge. Vacation pay and pay in lieu of notice are allocated to specific time periods.

In the instant case the payments under the so-called plan for sickness or disability are even more closely associated with particular periods of time

than in situations involving vacation pay or pay in lieu of notice. Vacation pay or pay in lieu of notice, while allocated to a specific period of time, is normally paid to an employee even though he does not remain unemployed during that particular period of time. In contrast the disability payments under this employer's plan are paid in the form of regular wages and are only payable after a continuous week of unemployment as the result of illness or disability. Thus the payments under the plan must be considered more akin to vacation pay or pay in lieu of notice rather than to severance pay. It follows that the payments under the plan cannot be treated as supplemental benefits. They are clearly a form of wages.

We also wish to point out another aspect of the case which causes us grave concern. If we adopt the claimant's position and treat all wage continuation plans as supplemental benefits, section 2656 would be meaningless. We are not prepared to find such a total absence of purpose in a specific act of the legislature.

We hold that in order for section 1265 to exclude employer compensation from being considered as wages under section 2656 of the code, it must be clear that the compensation is not wages, is not allocated to a particular period of time, and is paid solely for the purpose of supplementing disability benefits.

The facts in this case do not satisfy the criteria or test we have enunciated. Accordingly, it is concluded that the compensation paid the claimant was a form of wages and section 2656 applies.

The second issue in this case concerns the definition of overtime. Prior to 1968 section 2656 did not contain the words "exclusive of wages paid for overtime work." These words became a part of the statute on November 13, 1968. In interpreting the statute as it existed prior to November 13, 1968, we held in Disability Decision No. 668 that a claimant was entitled to disability benefits if he lost any wages including overtime or premium time by reason of disability. It is apparent that the legislature amended the statute in order to reverse that decision and exclude from consideration any payments for overtime work.

The claimant apparently feels that there is a difference between overtime and premium pay and that he is entitled to disability payments for loss of premium pay if not for loss of overtime pay. We have never made a distinction between the two types of pay (Disability Decision No. 668).

The Supreme Court in Bay Bridge Operating Company v. Aaron, N.Y., 68 S. Ct. 1186, 334 U.S. 446, in considering the problem of computing the regular rate of pay for certain longshoremen under the Fair Labor Standards Act stated as follows:

"The definition of overtime premium thus becomes crucial in determining the regular rate of pay. We need not pause to differentiate the situations that have been described by the word overtime. Sometimes it is used to denote work after regular hours, sometimes work after hours fixed by contract at less than the statutory maximum hours and sometimes hours outside of a specified clock pattern without regard to whether previous work has been done, e.g.; work on Sundays or holidays. It is not a word of art. . . . It is that extra pay for work because of previous work for a specified number of hours in the work-week or workday. It is extra pay of that kind which we think that Congress intended should be excluded from computation of regular pay."

The court further stated:

" . . . Under the definition a mere higher rate paid as a job differential or as a shift differential, or for Sunday or holiday work is not an overtime premium. . . . The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium."

In another part of the Bay Bridge case cited above, the court went on to hold that the word "overtime" is not a word of art.

We adopt the reasoning and definition of the Supreme Court. It is our opinion that the words "overtime pay" contained in section 2656 mean any pay received by an employee as the result of working more than the required hours of his normal workday or workweek. In this case that means work in excess of eight hours a day or 40 hours a week.

It is to be further noted that the California Legislature did not state in section 2656 that the weekly wage immediately prior to the commencement of disability should be exclusive of overtime pay. The legislature said such wage should be computed exclusive of wages paid for overtime work. It is apparent that the intention of the legislature was to place the emphasis on the time worked, and whether or not it was overtime rather than on any niceties concerning computation.

The claimant's weekly pay, including his shift differential for a 40-hour week, was \$172.50 per week. All monies received by him which were over that amount for his last full week of work prior to disability were paid as a result of overtime. Therefore, under the provisions of section 2656, it must be excluded in ascertaining whether or not he suffered a wage loss by reason of disability. The claimant received the amount of \$172.50 for each week of his disability from the employer. He did not suffer a wage loss. The claimant is ineligible for disability insurance benefits.

DECISION

The determination of the department is affirmed. Benefits are denied.

Sacramento, California, November 4, 1969

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